SUPREME COURT, U.S.
FILED
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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 2001

ABRAHAM HIRSCHFELD,

Petitioner,

–v.–

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT APPELLATE DIVISION—FIRST DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

IRVING ANOLIK
A Member of the bar
of this Court
Attorney for Petitioner
225 Broadway, Suite 1902
New York, New York 10007
(212) 732-3050

Virgil Mountain, Inc. (212) 779-4046 L5734

QUESTIONS PRESENTED FOR REVIEW

1. Whether the petitioner was deprived of the effective assistance of counsel by virtue of the trial court's refusal to allow him to choose counsel of his own choice nor would the judge allow him to act as his own counsel, despite his request to do so? (FIFTH, SIXTH and FOURTEENTH AMENDMENTS)

2. Whether the petitioner was deprived of his constitutional right to confrontation by virtue of the fact that the identity of an essential witness was never produced nor revealed to him or his counsel? (FIFTH, SIXTH and FOURTEENTH AMENDMENTS)

3. Whether the refusal and inability of the prosecution and court to produce and reveal the identity of the mysterious essential third party witness, to whom petitioner's alleged accomplice, Veltri, delivered a sum of money from petitioner to the mysterious third party to murder his partner, Stahl? (FIFTH, SIXTH and FOURTEENTH AMENDMENTS)

4. Whether the trial court deprived petitioner of a fair trial when it denied his application to have a lawyer of his own choice to second seat him at his own expense so as to allow him to try his own case as he demanded to do and which the court knew he had successfully done in a prior trial in another matter? (FIFTH, SIXTH and FOURTEENTH AMENDMENTS)

5. Whether the alleged corroborative statement obtained by Rosemary Singer acting as an "agent provocateur" of the prosecutor was unconscionably obtained and therefore inadmissible under *Spano v. New York*, 360 U.S. 316

(1959) and its progeny, and in violation of the FIFTH, SIXTH and FOURTEENTH AMENDMENTS?

THE PARTIES

The parties are Abraham Hirschfeld and the People of the State of New York.

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OPINIONS BELOW

The Judgment of Conviction and Sentence, dated August 1, 2000, is printed at Appendix A.

The opinion of the Appellate Division, First Department, which affirmed the judgment of conviction, was entered on April 19, 2001. It is printed at Appendix B.

On August 3, 2001, associate Judge Victoria A. Graffeo denied petitioner's application for leave to appeal to the Court of Appeals. The Certificate Denying Leave is printed at Appendix C.

JURISDICTIONAL STATEMENT FOR THIS COURT

The judgment of conviction was rendered on August 1, 2000, convicting petitioner of criminal solicitation in the second degree and sentencing him to a term of one to three years. The Appellate Division of the Supreme Court, First Department, affirmed the judgment of conviction on April 19, 2001.

Leave to appeal to the New York Court of Appeals was sought but was denied on August 3, 2001.

The conviction was predicated upon the petitioner's alleged violation of Penal Law section 100.10 committed as follows:

> "The defendant, in the County of New York from in or about July 1996 to in or about December 1996, with intent that another person engage in conduct constituting a Class A felony, to wit, Murder in the Second degree, in violation of Penal Law Sec.

125.25(1) solicited, requested, commanded, importuned and otherwise attempted to cause such other person to engage in such conduct."

A trial held in September/October 1999 ended in a hung jury and the declaration of a mistrial. A new trial commenced on May 24, 2000 and concluded with a jury verdict of guilty with a sentence on August 1, 2000 (1-3 years).

Jurisdiction to review the judgment herein by Certiorari is conferred under 28 U.S.C. 1254(1) and Rules 17.1(a) and (c) of the Rules of this Court. Copies of the Judgment of Conviction and Sentence, the Opinion of the Appellate Division and the Certificate Denying Leave to Appeal to the Court of Appeals are annexed as appendices.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the U.S. Constitution

"Due Process of Law"

The Sixth Amendment of the U.S. Constitution

"Right of Confrontation"
"Right to Counsel"

The Fourteenth Amendment of the U.S. Constitution

Incorporates the Foregoing as Applied to the States

No.

In the United States Supreme Court

OCTOBER TERM, 2001

ABRAHAM HIRSCHFELD,

Petitioner,

-v.-

THE PEOPLE OF THE STATE OF NEW YORK,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT APPELLATE DIVISION—FIRST DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Abraham Hirschfeld is a highly respected and well known tycoon in the real estate field, and although coming from Poland to this land from humble beginnings, he became a self-made multi-millionaire.

He ran for high public offices, and although not elected, he was regarded as a creditable candidate; was an owner of the New York Post; and involved in other important ventures.

Petitioner is in his early 80's, but possesses all his faculties.

He had formed a business partnership with Stanley Stahl who died of natural causes in August 1999. Petitioner became involved in litigation with Stahl several years earlier. The thrust of the indictment of Hirschfeld charged that he sought to have Stahl murdered. The State's position was that petitioner asked one Joseph Veltri to "take care" of Stahl, but Veltri called petitioner "crazy" and categorically refused.

The prosecution hypothesized that petitioner somehow solicited unknown and never identified persons to commit the murder, using Veltri to deliver a sum of money to an unseen individual whom Veltri said was an unknown and unseen individual seated in a car. This "phantom" allegedly opened his coated, opaque side window a tiny bit and was supposedly handed some money and a photo of Stahl by Veltri. (As an accomplice, Veltri's testimony was insufficient without corroboration.)

An equivocal tape recording secretly made at the prosecution's behest by Hirschfeld's secretary was admitted into evidence over objection, as needed corroboration.

On a second occasion, Veltri, claimed that Hirschfeld was seeking to "hurt" Stahl, not to kill him. (app. 304 and 305).[1]

Veltri's incredible testimony was that petitioner handed him a sizable amount of cash ($75,000) to give to the unknown and unidentified assassin without asking for any receipt or corroboration that Veltri in fact ever delivered any cash to this "phantom". (app. 168, 228, 233 and 247).

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[1] Numbers in parentheses refer to minutes of the appendix in the Appellate Division.

Veltri testified quite incoherently and supposedly complained to petitioner that he did not want to put himself "in the middle of the ocean".

Hirschfeld allegedly retorted, "You put yourself in the middle of the ocean." Veltri stated that he told petitioner to "go to hell" and then walked away. (app. 172).

Other than Veltri's equivocal testimony, there was no other evidence that Hirschfeld ever sought to have Stahl killed.

Incredibly Stahl was never killed but died of natural causes. Veltri sometime later notified the "New York Times" but not the authorities. (app. 175).

Later Veltri recalled that he notified Stahl in March of 1997 that he thought that Hirschfeld "got a contract on you for a few hundred thousand dollars." (app. 176).

Stahl contacted the District Attorney's office which led to their contact with Veltri. Veltri cooperated with the prosecutor because he was promised that he would not be prosecuted himself. (app. 178).

It is significant that the petitioner previously had had disputes with the District Attorney's office.

Hirschfeld's long time secretary, Rosemary Singer, was proselytized to tape an equivocal conversation with Hirschfeld in exchange for the State's promise not to prosecute her for her failure to report most of the income she had received from Hirschfeld.

Hirschfeld, in that conversation, told Singer not to worry and to tell Veltri "go to hell". "This guy's a thief...he just

fooled me all along. And if he talks much more, I will put him in jail…I'll sue him for a refund of the money." (app. 401).

Singer asked "the money for what?" Hirschfeld allegedly retorted, " I gave him money. He told me he could do things and this and I gave him a lot of money…he stole the money and did nothing."

Singer then said, "He's gonna say you wanted Mr. Stahl murdered. You're gonna go to jail."

Hirschfeld told Rosemary Singer "I never wanted him to go through the murder…I forgot about it, soliciting money, I kill Rosemary. So he's the one who is guilty and if he can do those things. That's what he should do."

(We ask this court to note that Hirschfeld's words about Veltri having agreed to do something, having taken money, and having done nothing, *tells a story in sharp conflict with the alleged payment to-a-mystery man story which Veltri told and upon which the indictment rested.*)

In his Grand Jury testimony, petitioner stated that he gave Veltri between $50,000.00 or $75,000.00 in cash as a bonus for construction work he had done and certainly not for harming Stahl.

In a television interview, upon which the State also relied and which was admitted into evidence, Hirschfeld again stated that he paid Veltri a $75,000.00 bonus and also declared that Singer and Veltri had conspired with each other to steal money from Hirschfeld. (app. 520). Furthermore, Hirschfeld stated that Veltri had proposed to Hirschfeld that he should pay Veltri a half million dollars to kill Stahl, but that Hirschfeld "refused to pay 5 cents." (app, 521).

The defense maintained that Veltri was a liar and that testimony of Veltri's own son branded his father as being a liar and deceitful.

The defense maintained that Veltri was nothing but an extortionist.

The defense also presented evidence showing that Hirschfeld had no motive to have Stahl killed. On the contrary, it was Stahl who had made Hirschfeld a wealthy man and, in any event, were Stahl to die, his interest in the partnership would go to members of his own family and not to Hirschfeld. (see, app. 418-19, 509-10, 522).

ARGUMENT

POINT ONE

Petitioner was deprived of the effective assistance of counsel by virtue of the trial court's refusal to allow him to choose counsel of his own choice, nor would that court allow him to act as his own counsel as he demanded. This violated petitioner's rights under the Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution.

In the case of *Faretta v. California*, 422 U.S. 806, 818-20 (1975) and explicitly guaranteed by the New York State Constitution, Article 1, sec. 6, the right of an accused to proceed *pro se* is a fundamental right implicitly guaranteed by the Sixth Amendment of the United States Constitution. (*see People v. Rosen*, 81 N.Y.2d 237, 243, 597 N.Y.S.2d 914 (1993).

In the more recent holding by the Supreme Court in *McKaskie v. Wiggins*, 104 S.Ct. 944, 79 L.Ed 2d 122 (1984), which reaffirmed *Faretta*, this tribunal held that a defendant had an absolute right to represent himself in a criminal case and further held that standby counsel was definitely allowed to assist a *pro se* defendant.

POINT TWO

The trial justice, following the declaration of the mistrial, was served with a *pro se* motion by Petitioner demanding that he be permitted to represent himself at the impending retrial. The Court failed to rule upon this motion; thus effectively precluding Hirschfeld from *pro se* representation. This denied his Fifth, Sixth and Fourteenth Amendment right to counsel of his own choice.

We have established that a defendant such as Hirschfeld had an absolute right to *pro se* representation which he clearly moved for and demanded. Yet, characteristically the trial court turned a deaf ear to his demands and ignored the motion by failing to rule upon it. This patently violated his Fifth, Sixth and Fourteenth Amendments' rights. Even if it be assumed that the Court in essence denied his motion, it still would have been a constitutional violation, which it was. (*see, Faretta v. California, supra.*).

To exacerbate the court's error, Petitioner was also precluded from having a lawyer of his own choice, which he offered to pay for, to second seat him (standby counsel).

In modern court experience and procedure it is not at all uncommon for a *pro se* litigant to have standby counsel at his side. (*McKaskie v. Wiggins, supra.*).

In the court below, the respondent casuistically argued that Hirschfeld forfeited his right to represent himself by asking for standby counsel.

Ergo, the trial judge compelled petitioner to go through his trial represented by counsel but not *pro se*. This we maintain was error of Constitutional dimension.

In petitioner's May 18, 2000 *pro se* affidavit at paragraph five thereof, Hirschfeld insisted:

> "I hereby object to this Court's ruling that prohibits me from having the assistance of competent counsel in my defense in violation of my Constitutional Rights under the Sixth Amendment under the United States Constitution."

It is significant that in a previous important trial involving himself, Hirschfeld acted *pro se* and won an acquittal. We mention this fact so that the Court will recognize that Hirschfeld was not being fatuous but quite serious.

POINT THREE

The charge against Hirschfeld was criminal solicitation in the second degree which mandated proof beyond a reasonable doubt that petitioner solicited, importuned and so forth another person to commit murder in the second degree. The alleged person so importuned and solicited was in essence a "phantom" because the identity of that individual was never revealed nor identified except through the incredible testimony of Mr. Veltri. This manifestly denied Hirschfeld his absolute right under the Sixth Amendment to confront the witnesses against him.

The right of confrontation which includes the right of cross examination of witnesses against an accused has been called "the greatest legal engine ever invented for the discovery of truth", which ensures one of the main tenets of a fair trial.

The evidence of the prosecution must be subject to testing by defense counsel who alone has an interest in showing them up ill-founded or mistaken. (*See, Alderman v. United States*, 394 U.S. 165 (1969); *Douglas v. Alabama*, 380 U.S. 415 (1965); *Pointer v. Texas*, 380 U.S. 400 (1965); *Dennis v. United States*, 384 U.S. 855 (1966); and 5 Wigmore Evidence, sec. 1367 (3d Ed 1940).

The trial Court's rulings therefore were analytically cognate to denying Hirschfeld's right to counsel and access to counsel because the Court precluded him from representing himself and have self-paid standby counsel assisting him. (*Powell v. Alabama*, 287 U.S. 45, 57, 58 (1922).

POINT FOUR

The testimony of the prosecution was insufficient as a matter of law to have justified a verdict of guilty. The case rested exclusively upon the totally unbelievable testimony of the witness Veltri who admittedly had begun to cooperate with the prosecutor because he was promised immunity from prosecution himself as a reward for his testimony. Veltri, however, was an accomplice as a matter of law which under New York State statutes was insufficient to warrant an indictment, let alone a conviction.

As corroboration for this gossamer and absurd testimony the prosecutor enlisted Rosemary Singer, petitioner's long time secretary to act as an "agent provocateur".

We have already established that the crime charged against petitioner mandated proof beyond a reasonable doubt that he procured, *etc.* a person whom he sought to commit the murder of Hirschfeld's partner, Stanley Stahl.

Historically and concededly we all know that Stahl died a natural death and there is no evidence that anyone ever tried to murder him. The witness Veltri maintained that Hirschfeld had initially asked him to murder Stahl but Veltri branded the request as being "crazy" and categorically refused to do it.

Veltri claimed, however, that he did agree to deliver $75,000.00 to an unknown and unidentified individual at the behest of Hirschfeld.

Standing as it is, this would have been and was insufficient evidence as a matter of law to warrant a conviction because of the no-accomplice testimony rule in New York.

To overcome this obvious dearth of sufficient proof the prosecution coerced Hirschfeld's former secretary, Rosemary Singer, to secretly tape him with instructions to instigate a conversation which hopefully would constitute independent cooperation. Ms. Singer was reciting a script provided by the prosecution which we maintain violated the letter and spirit of *Spano v. New York*, 360 U.S. 316, 79 S.Ct. 1202 (1959) where in reversing a conviction for murder because of the use by the prosecutor of an "agent provocateur" [Rosemary Singer in this case]. In reversing Spano's conviction, the Chief Justice recalled John Gay's couplet:

"An open foe may be a curse
But a pretended friend is worse"

The use of the tactics of the prosecution in this case are unconscionable and *ipso facto* warrant reversal. (*cf: Massiah v. United States*, 377 U.S. 201, 845 S.Ct. 1199 (1964)).

In the case of *Mesarosh v. United States*, 352 U.S. 1, 9, 14, this Court held that the dignity of the United States Government will not permit convictions based upon such evidence.

See also: Wong Sun v. United States, 371 U.S. 471; *Silverthorne Lumber Co. v. United States*, 251 U.S. 385; and *I Cooley, Constitutional Limitations (8th Ed.) Section 646.*

In *Cooley, supra* that famous legal scholar declared:

"In this country where officers are specifically appointed or elected to represent the people in these

prosecutions, their position gives them immense power for oppression; and it is to be feared that they do not always sufficiently appreciate the responsibility, and wield their power with due regard to the legal rights and privileges of the accused..."

In *Coolidge v. New Hampshire*, 403 U.S. 443, quoting with approval of the language in *Boyd v. United States*, 116 U.S. 616 at 635 the Supreme Court cautioned:

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but *illegitimate and unconstitutional practices, get their first footing in that way, namely by silent approaches and slight deviations* from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions...should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right as if it consisted more in sound than in substance. It is the duty of the Courts to be watchful for the Constitutional rights of the citizen, and against any stealthy encroachment thereon." (emphasis ours).

Finally, it is apt to recall the dissenting language of Justice Brandeis of this Court in *Olmstead v. United States*, 277 U.S. 438, 485, but quoted with approval in *Berger v. New York*, 388 U.S. 41, where this Court proclaimed:

"Decency, security and liberty alike demand that government officials shall be subject to the same rules of conduct that are commands to the citizen. In a government of laws, the existence of the government will be imperiled if it fails to observe the law scrupulously...[T]o declare in the administration of the criminal law, the end justifies the means – to declare

that the government may commit crimes in order to secure the conviction of a private criminal – would bring terrible detribution. *Against that pernicious doctrine this court should resolutely set its face.*" (emphasis supplied).

Lastly, we would respectfully refer this tribunal to its holdings in *Miranda v. Arizona*, 384 U.S. 436, and *Mapp v. Ohio*, 367 U.S. 643, where it was held (e.g. *Mapp v. Ohio,* 367 U.S. at 659);

"The criminal goes free if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the character of its own existence."

CONCLUSION

Based upon the foregoing, we respectfully submit that the writ of certiorari should be granted and the rulings of the Courts below vacated.

Dated: New York, New York
October 31, 2001

Respectfully submitted,

IRVING ANOLIK
A Member of the bar
of this Court
Attorney for Petitioner
225 Broadway, Suite 1902
New York, New York 10007
(212) 732-3050

APPENDIX A

Certificate of Disposition, Judgment of Conviction and Sentence Dated August 1, 2000

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MISCELLANEOUS CERTIFICATE
NO. 20931 FEE PAID $10.00

THE PEOPLE OF THE STATE OF NEW YORK

-against-

ABRAHAM HIRSCHFELD

on INDICTMENT for Criminal Solicitation 2d

No. 10122-98
Filed 12-8-98

I, NORMAN GOODMAN, County Clerk and Clerk of the Supreme Court, New York County, do certify that it appears from an examination of the Records on file in this office, that

On 6-16-2000 the above named Defendant was tried and found guilty of the crime(s) of Criminal Solicitation in the Second Degree

Further that on 8-1-2000 the Defendant was sentenced by the Hon. Beal, a Justice of the Supreme Court, to NYSDOC to a minimum of (1) one year and to a maximum of (3) years

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official Seal this _____ day of OCT 26 2001

[Raised Seal of the County of New York]
OCT 26 2001

/s/
County Clerk and Clerk of the Supreme Court,
New York County.

APPENDIX B

Opinion of the Appellate Division, First Department
Entered April 19, 2001

Williams, J.P., Wallach, Lerner, Rubin, Friedman, JJ.

3886 The People of the State of New York,
Respondent, Amyjane Rettew

- against-

Abraham Hirschfeld,
Defendant-Appellant. Irving Anolik

Judgment, Supreme Court, New York County (Carol Berkman, J. at initial denial of suppression hearing; Ira Beal, J. at subsequent denial of suppression hearing, jury trial and sentence), rendered August 1, 2000, convicting defendant of criminal solicitation in the second degree, and sentencing him to a term of 1 to 3 years, unanimously affirmed.

Defendant's various challenges to the sufficiency of the evidence are unpreserved and we decline to review them in the interest of justice. Were we to review these claims, we would find that defendant's conviction was based upon legally sufficient evidence. Moreover, the verdict was not against the weight of the evidence and there is no basis for reversal in the interest of justice.

The evidence warranted the conclusion that defendant, through an employee serving as an intermediary, hired an unidentified individual to kill defendant's business partner. There is no basis upon which to disturb the jury's determinations concerning credibility. The credible testimony of the intermediary was corroborated by defendant's tape-recorded admissions to his secretary, who was cooperating with the prosecution *(see, People v Breland*, 83 NY2d 286, 292-294).

Further corroboration was found in various circumstantial evidence including damaging statements made by defendant in his Grand Jury testimony and his statements to the news media. The record clearly establishes defendant's homicidal intent and does not support defendant's argument that he was convicted on the basis of "rash," "thoughtless" or "eccentric" utterances.

Contrary to defendant's unpreserved argument, the fact that the killer-for-hire remains unidentified does not affect the sufficiency or weight of the evidence in this case. The intermediary never learned the name of the prospective assassin, and never saw this person because the conversations and transfers of cash took place through a car's slightly opened tinted window. However, the People were not required to prove this person's identity (*see, People v Taylor*, 74 AD2d 177, 179, *lv denied* 50 NY2d 1005), and the totality of the evidence led to the inescapable conclusion that defendant criminally solicited that individual.

Defendant did not make an unequivocal request to represent himself, and to the extent that he made such request, that request was abandoned. His motion to proceed *pro se* was not "unequivocal" because it was made in the context of numerous delaying tactics and complaints about defendant's former counsel, and was couched in terms of defendant's allegedly being constrained to represent himself in event that the court denied him time to retain new counsel .(*see, People v Payton*, 45 NY2d 300, 314, *revd on other grounds*, 445 US 573. In any event, during the pendency of defendant's motion he retained new counsel and proceeded with the trial, expressing no further wish to represent himself. Accordingly, the record establishes that defendant abandoned his application (*People v Graves*, 85 NY2d 1024, 1027; *People v Harding*, 245 AD2d 233, *lv denied* 91 NY2d 1008; *People v Douglas*, 227 AD2d 130, *lv denied* 88 NY2d 955).

Although defendant had been granted a hearing on his claim that his prosecution-arranged, tape-recorded conversations with his secretary should be suppressed on the ground that they were made while he was allegedly represented by counsel on the instant charges (*see, People v West*, 81 NY2d 370), the court initially presiding over the matter properly determined that such hearing had been forfeited as a result of defendant's egregiously dilatory tactics. These extraordinary delaying tactics culminated in defendant's retention of new counsel on the eve of the long-awaited hearing, with knowledge that the new counsel would be unavailable on or near the hearing date. The court also properly determined that the suppression motion was meritless, and the court that ultimately presided over the matter properly exercised its discretion in applying the law of the case doctrine. In any event, defendant was not prejudiced by the denial of the hearing, since the record establishes that defendant had no basis for his assertion that he was represented on the instant charges at the time of the statement, a claim upon which a defendant bears the burden of proof (*People v Rosa*, 65 NY2d 380).

Defendant's remaining contentions are unpreserved and we decline to review them in the interest of justice. Were we to review these claims, we would reject them.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 19, 2001

/s/
DEPUTY CLERK

APPENDIX C

Decision of the New York State Court of Appeals
Dated August 3, 2001

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. VICTORIA A. GRAFFEO,
Associate Judge

THE PEOPLE OF THE STATE
OF NEW YORK,

Respondent,

-against-

ABRAHAM HIRSCHFELD,

Appellant.

CERTIFICATE
DENYING
LEAVE

I, VICTORIA A. GRAFFEO, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to section 460.20 of the Criminal Procedural Law and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission is hereby denied.

Dated: August 3, 2001
at Albany, New York

/s/
Associate Judge

* Order of the Appellate Division, First Department, entered April 19, 2001, affirming a judgment of the Supreme Court, New York County, rendered August 1, 2000.